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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

MARK MILLS, et al.,
Petitioners,

VS.

RUBIE ROGERS, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR BARBARA JAMISON, ET AL., PLAINTIFFS IN JAMISON v. FARABEE, UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, NO. C78 0445 WHO, AS AMICI CURIAE

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QUESTIONS PRESENTED

Questions presented by this case and addressed by this brief are as follows:

1. Whether forcible treatment of an involuntarily committed mental patient with antipsychotic drugs implicates a liberty interest created by Massachusetts law and protected by the Due Process Clause of the Fourteenth Amendment.

2. Whether an involuntarily committed patient has a right under the Fourteenth Amendment to refuse state-ordered treatment with antipsychotic drugs and, if so, whether Massachusetts has a compelling interest that may, under its own law, be asserted in favor of such treatment, absent an emergency.

3. Whether involuntary commitment under Massachusetts law is a constitutionally adequate basis for depriving a mental patient of his fundamental right to refuse treatment with antipsychotic drugs.

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INTEREST OF AMICI CURIAE*

Amici are the plaintiff class representatives in a certified class action currently pending in the United States District Court for the Northern District of California, *Jamison v. Farabee* (No. C78 0445 WHO). Like the case at bar, *Jamison* raises a constitutional challenge to state procedures

*Consent to the filing of this brief has been obtained from the parties to this action, and copies of their letters have been lodged with the Clerk of the Court.

allowing forced administration of antipsychotic drugs to involuntarily committed mental patients. The complaint seeks both injunctive relief and a declaratory judgment recognizing an involuntarily committed patient's constitutional right, absent a judicial determination of incompetence, to make an informed choice and to refuse treatment with antipsychotic medications. Indeed, because of the similarity of the constitutional issues presented in the two cases and the likelihood that this Court's decision would have a significant impact upon their resolution, *Jamison* has been stayed pending announcement of decision in the instant case. Accordingly, *amici* have a substantial interest in this case.

This brief is filed in support of respondents and urges affirmance of the First Circuit's decision. We emphasize the role played by *state law* at several junctures in the constitutional analysis for two reasons. First, *amici* contend that Massachusetts law not only precludes several of the grounds upon which petitioners urge reversal, but also provides a ground for affirmance not relied on by the Court below: that *state* law creates a right to refuse treatment with antipsychotic drugs to which procedural due process protections attach under the Federal Constitution. Second, even if Massachusetts law did not mandate the relief granted below, different laws of other states, including California, could lead to different results in other actions. *Amici* believe that by clarifying the state-law questions presented, this brief may assist the Court to frame its decision on the federal constitutional issues, giving due weight to different state schemes.

STATEMENT OF THE CASE

Amici adopt and incorporate by reference the "Statement of the Case" contained in Respondents' brief.

SUMMARY OF ARGUMENT

Since the First Circuit's decision in this case, the Supreme Judicial Court of Massachusetts has held that "[a]bsent an overwhelming State interest, a competent individual has the right to refuse . . . treatment" with antipsychotic drugs. *In re Guardianship of Roe*, ... Mass. ....., 421 N.E.2d 40, 51 (1981). Moreover, a person who is himself incompetent to exercise this fundamental right has the right to a judicial determination as to what his decision would have been if he were competent to choose. This "substituted judgment" must be based on the "individual's values and preferences" and emphatically "*not* what is medically in the ward's best interests." *Id.* at 52 (emphasis original). In short, Massachusetts law denies any *state* interest in forcibly drugging any individual, whether competent or not, on the grounds that the treatment is medically in his best interests.

This decision affects the analysis of federal constitutional rights in two distinct ways. First, it creates a liberty interest under state law to which *federal* due process protections apply. Because state law gives rise to a legitimate expectation that these profoundly intrusive drugs will not be forcibly administered except in certain limited circumstances and after some kind of procedure, the federal constitution governs the adequacy of the procedures for making the necessary determination.

Second, the decision in *Guardianship of Roe* limits the state's legitimate interests for purposes of striking the balance with substantive liberties under the federal constitution. Massachusetts forswears as a matter of state law any *parens patriae* interest in forcing patients to accept treatment medically determined to be in their best interests. Petioners may not rely in this Court on a justification for forced treatment that would not be regarded as a legitimate state interest by the courts of Massachusetts.

Finally, Massachusetts procedures for involuntary commitment do not provide a constitutionaliy adequate basis for depriving a competent patient of his right to refuse treatment with antipsychotic drugs. The finding that a patient is "mentally ill" does not give the state a compelling interest in forcing him to accept a treatment as intrusive as antipsychotic drug treatment. Nothing in the Massachusetts statutes governing involuntary commitment suggests that there is any consideration or determination at the commitment stage as to whether sufficient reason exists to justify seriously intrusive modes of treatment for the particular patient involved. Thus the Court of Appeals correctly has held that some procedure in addition to the involuntary commitment itself is necessary in order to provide the procedural protections required by the Due Process Clause of the Fourteenth Amendment before a patient can be deprived of his right to refuse treatment with antipsychotic drugs.

ARGUMENT

I

AN INVOLUNTARILY COMMITTED PATIENT HAS A LIBERTY INTEREST, ROOTED IN STATE LAW AND PROTECTED BY THE DUE PROCESS CLAUSE, IN BEING FREE FROM FORCIBLE TREATMENT WITH ANTIPSYCHOTIC DRUGS

Many decisions of this Court establish that a constitutionally protected liberty interest may be created by state law as well as by the substantive liberties inherent in the federal constitution. *See, e.g., Vitek v. Jones,* 445 U.S. 480, 488 (1980); *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex,* 442 U.S. 1, 7 (1979); *Wolff v. McDonnell,* 418 U.S. 539, 555-557 (1974).

The right under Massachusetts law to be free from forcible treatment with antipsychotic drugs creates a liberty interest, independent of the federal constitutional right of privacy upon which the Court of Appeals relied, *Rogers v. Okin,* 634 F.2d 650, 653 (1st Cir. 1980), *aff'g in part & rev'g in part,* 478 F. Supp. 1342 (D. Mass. 1979), that is sufficient to invoke procedural due process protections. Moreover, the laws of other states, including those of California, which apply to the action brought by *amici,* present distinct constitutional issues which should not be foreclosed by the Court's decision in this action.

In a decision announced after the decisions below, the Supreme Judicial Court of Massachusetts held that a fundamental liberty interest is at stake when a mentally ill person is forced to undergo treatment with antipsychotic drugs. *In re Guardianship of Roe,* ..... Mass. ....., 421 N.E.

2d 40 (1981). The question considered in that case was whether the guardian of an incompetent ward could consent to treatment of the ward with antipsychotic drugs. The Court began its analysis with what it viewed as an "indisputable" premise: "[a]bsent an overwhelming State interest, a competent individual has the right to refuse such treatment." *Id.* at 51 & n.9. The Court rested this right on three grounds: "the constitutional right to privacy," "the inherent power of the court to prevent mistakes or abuses by guardians" under Massachusetts law, and the common law right of self-determination or a substituted judgment regarding " 'what shall be done with [one's] own body' " *Id.* at 51 n.9, quoting *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 129, 105 N.E. 92 (1914) (Cardozo, J.). *See also Thibault v. Lalumiere*, 318 Mass. 72, 60 N.E.2d 349 (1945). State law alone sustains at least the last two of these three grounds.

Concluding that an incompetent person is entitled to the same respect as a competent person, the Court specifically considered the procedures to be followed before a non-institutionalized incompetent person could be forcibly treated with antipsychotic drugs. It held that an incompetent person cannot be forcibly drugged except under the following circumstances:

> (1) [W]here a judicial substituted judgment determination indicates that the incompetent individual would, if competent, accept antipsychotic drugs, or (2) where there exists a state interest of sufficient magnitude to override the individual's right to refuse.

Guardianship of Roe, 421 N.E.2d at 61.

The Court in *Guardianship of Roe* made clear that its decision identified the interests at stake and processes for balancing them, but expressly declined "to strike the balance in any individual case." *Id.* at 62. Specifically, with respect to the rights of involuntarily committed patients, the Court observed that it would be premature to consider "the relative importance of adverse interests." *Id.* This limitation does not, however, diminish the impact of the decision on the federal constitutional analysis. The possibility that there might be an adverse state interest "of sufficient magnitude to override the individual's right to refuse[,]" 421 N.E. 2d at 61, does not detract from the existence of a liberty interest—even on the part of involuntarily institutionalized patients—requiring procedural due process. Whether state interests prevail is a federal constitutional question to be decided in accordance with constitutionally adequate procedures, and not a question that can determine whether a constitutionally protected liberty interest exists in the first instance.

The principles of state law announced in *Guardianship of Roe* create a substantive right in *all* persons to refuse treatment with antipsychotic drugs absent an overwhelming state interest, and give rise to legitimate expectations on the part of involuntarily committed patients that their fundamental right will not be taken away without procedural protections. It is clear that a finding that the patient is incompetent—whether explicit or somehow implicit in the commitment decision—would not, standing alone, allow the institution to administer antipsychotic drugs. A finding of incompetency would only invoke the right to a substituted judgment as to what the patient would have chosen if he were competent.

Thus, *Guardianship of Roe* gives rise to a legitimate state-protected expectation that there will be some kind of procedural due process as to whether the patient is competent; if incompetent, whether he would refuse if he were competent; and if he refuses, or would refuse, whether institutional interests outweigh his right to refuse in the particular circumstances. This legitimate expectation creates a liberty interest subject to procedural due process protections, just as did the Nebraska parole statute interpreted in *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 11 (1979), or the prisoner transfer statute interpreted in *Vitek v. Jones*, 445 U.S. 480, 489-90 (1980). It is therefore a question of federal constitutional law whether the procedures are adequate.

Amici contend that Massachusetts law creates a liberty interest sufficient, standing alone, to justify the relief in this case. However, even if the Court were to determine otherwise, its holding would not justify the broad contention of petitioners that there is no constitutionally protected right to refuse antipsychotic drugs. For example, the laws of Illinois and Idaho, as well as California, the home state of *amici*, each create a liberty interest distinguishable from the state-created liberty interest directly involved in the case at bar. The procedures that would be constitutionally required to protect the distinct liberty interests created by the laws of those states might justify enforcement, under the federal constitution, of a right to refuse treatment even if no such right arose under Massachusetts law.

An Illinois statute specifically provides that adult patients or their guardians:

> [S]hall be given the opportunity to refuse generally accepted mental health . . . services, including but not limited to medication, unless such services are necessary to prevent the recipient from causing serious harm to himself or others.

ILL. REV. STAT. ch 91½ § 2-107 (1979). Similarly, an Idaho statute provides:

> (a) Every patient shall have the following rights: . . . (4) To refuse specific modes of treatment; . . . . Only in cases of emergency or when a court has determined that a patient lacks capacity to make informed decisions about treatment, may the director of a facility deny a patient's rights under subsection (a)(4) of this section.

IDAHO CODE § 66-346 (1981). In California a liberty interest is created by, inter alia, judicial decisions establishing a common law right of patients to be informed about proposed treatment and allowed to refuse. *Cobbs v. Grant*, 8 Cal. 3d 229, 242, 502 P.2d 1, 104 Cal. Rptr. 505 (1972).

Clearly, these state laws create liberty interests sufficient to serve as a predicate for procedural due process protections.

II

UNDER MASSACHUSETTS LAW, THE SUBSTANTIVE CONSTITUTIONAL RIGHT TO REFUSE ANTIPSYCHOTIC DRUGS CANNOT BE OVERRIDDEN ON THE BASIS OF A REFUSING PATIENT'S BEST MEDICAL INTERESTS

The findings below establish conclusively that antipsychotic drugs are powerful, mind-altering agents that unavoidably bring with them significant physical side-effects and a serious risk of permanent physical impairment. *Rogers v. Okin*, 478 F. Supp. 1342, 1359-60 (D. Mass. 1979). The attempts of petitioners and the *amici* urging reversal to cavil with the findings below, regarding, for example, the statistical incidence of tardive dyskinesia,[1] do not blunt the central point to be drawn from the technical facts: treatment with antipsychotic drugs cannot be separated from intrusions—substantial both in their impact during treatment and in their potential for permanent ill-effects—on mind and body.

This medical fact presents the patient, or the person deciding for him, with a choice that cannot be made on purely technical, medical, or psychiatric grounds. *In re*

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[1]As the opinions below noted, tardive dyskinesia is a serious and possibly irreversible neurological side effect of prolonged treatment with antipsychotic drugs, *Rogers v. Okin*, 634 F.2d at 653 n. 1; *Rogers v. Okin*, 478 F. Supp. at 1360. The studies cited by the District Court estimated that tardive dyskinesia strikes between 30 and 56 percent of patients treated with drugs for an extended period. *Id.* Petitioners cited other studies to the effect that 15% of chronically ill psychiatric patients treated with antipsychotic drugs suffer persistent tardive dyskinesia "that may be attributable to antipsychotic medication . . . ." Petitioners' Brief at 52.

Guardianship of Roe, ... Mass. ....., 421 N.E.2d 40, 51-52 (1981). The question is not whether the treatment will cure the patient, but whether the patient wants to live with the cure. Like the patient who must choose whether to risk the spread of gangrene or endure life without a leg, *Lane v. Candura*, ... Mass. App. ....., 376 N.E.2d 1232. (1978), the plaintiffs in *Rogers* and in *Jamison* are confronted with a medically recommended treatment that exposes them to a serious risk of permanent impairment. It is beyond question—and conceded by the petitioners here, as the Court of Appeals noted, *Rogers v. Okin*, 634 F.2d at 654—that a competent, noninstitutionalized person has the right to make this choice as a matter of personal autonomy. *See Guardianship of Roe*, 421 N.E.2d at 51 & n.9. The issue presented by both *Jamison v. Farabee* and the case at bar is whether, and in what circumstances, the treating staff of a state mental institution can make this decision against the wishes of an involuntarily committed patient.

A. Forcible Treatment with Antipsychotic Drugs Infringes Substantive Rights Under the United States Constitution That Can Be Overridden Only by a Compelling State Interest

The constitutional principles underlying the right of persons in general to refuse antipsychotic drugs are several, but not in conflict. Because of the seriousness of the intrusion on a patient's physical and mental integrity the Court of Appeals held that forcible treatment with antipsychotic drugs implicated constitutional rights found in "the penumbral right to privacy, bodily integrity, or per-

sonal security," *Rogers v. Okin*, 634 F.2d at 653. In a variety of contexts, this Court has recognized a guarantee of personal privacy regarding individual rights that are "fundamental" or "implicit in the concept of ordered liberty." *Roe v. Wade*, 410 U.S. 113, 153 (1973), *quoting Palko v. Connecticut*, 302 U.S. 319, 325 (1937). This fundamental right of personal privacy is variously seen as deriving from the First Amendment, the penumbra of the Bill of Rights, the Ninth Amendment, or the concept of liberty guaranteed by the first section of the Fourteenth Amendment. *Roe v. Wade*, 410 U.S. 113, 152 (1973). A similar guarantee may be seen in the general substantive protections provided by the due process clause of the Fourteenth Amendment. *See, e.g., Parratt v. Taylor*, ... U.S. ....., ..., 101 S. Ct. 1908, 1918 (1981) (Blackmun, concurring).

Whether characterized as a penumbral right or a liberty interest rooted in substantive due process, it is well established that the constitutional aegis of privacy protects not only the individual interest in avoiding disclosure of personal matters, but also "the interest in independence in making certain kinds of important decisions." *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977). This Court has recognized that the right to choose whether to undergo a seriously intrusive medical procedure is fundamental under the common law, *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250, 251 (1891), and that there is a fundamental constitutional right to make private choices regarding intrusive medical procedures in certain other contexts, *e.g., Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Roe v.*

Wade, 410 U.S. 113, 152-53 (1973). Lower courts have also recognized the individual's fundamental, constitutionally protected interest in choices concerning seriously intrusive state-ordered medical treatment. *See, e.g., Runnels v. Rosendale*, 499 F.2d 733, 735 (9th Cir. 1974); *Wyatt v. Stickney*, 344 F.Supp. 373, 380 (N.D. Ala. 1972), *aff'd sub nom., Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

Because the right to be free of serious bodily or mental intrusions is a fundamental civil right, a state may not engage in such intrusions unless they are justified by a *compelling* state interest, *see, e.g., Zablocki v. Redhail*, 434 U.S. 374, 387-88 (1978). *Roe v. Wade*, 410 U.S. 113, 155 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 447 n.7 (1972); or permitted by a constitutionally valid waiver of the right, *see, e.g., Barker v. Wingo*, 407 U.S. 514, 525 (1972).

In short, it is clear that forcible administration of antipsychotic drugs to a competent, non-institutionalized patient would require a compelling state interest. Nevertheless, petitioners argue that the applicable constitutional standard of scrutiny in this case is not whether the state has a compelling interest in overriding the involuntary patient's choice, but whether the state has a "rational reason" for doing so. Petitioners' brief ("Pet. Br.") at 18.

The argument turns entirely on the status of respondents as involuntarily committed mental patients. "Involuntary mental patients, like prisoners, have lost their freedom pursuant to due process court hearings in furtherance of statutorily prescribed social goals." Pet. Br. at 20-21. *See also* Pet. Br. at 46. But to say no more than this is to beg the important constitutional questions: *What* free-

doms are lost by virtue of involuntary commitment? *What* compelling state interests are served by the deprivation of these freedoms?

The fundamental right of a non-institutionalized person to refuse antipsychotic drugs can be regarded as "lost" upon commitment only if the state's interests in drugging an involuntarily committed person are sufficiently compelling to override the patient's freedom to refuse the drugs.[2] *Amici* herein wish to emphasize a limited but important point within this analytical framework. The central question—whether the state has interests sufficient to justify forcible treatment of a competent, involuntarily committed patient with antipsychotic drugs—turns on the *state law* defining the state interests involved. If, as *amici* contend, the question must be answered in the negative under Massachusetts law, then the decisions below must

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[2]The right to refuse drugs might be validly *waived*, as opposed to "lost," if the refusing patient had been determined to be incompetent and consent was given on his behalf by a legally authorized surrogate. However, unless the patient has been found incompetent, the state cannot constitutionally consent on his behalf. *Winters v. Miller*, 446 F.2d 65, 68 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971). Both Courts below concluded that Massachusetts involuntary commitment proceedings do not establish the incompetency of a committed patient. *Rogers v. Okin*, 634 F.2d at 658; *Rogers v. Okin*, 468 F. Supp. at 1361. Petitioners and *amici* favoring reversal do not question the Courts' analysis of state laws in this respect. Thus, forcible treatment with antipsychotic drugs cannot be justified on the basis of a purported waiver by the state of the involuntary patient's right to refuse.

be affirmed.[8] Moreover, an adverse decision in the present case, based on Massachusetts law, would not foreclose the conclusion that a patient's constitutional right to refuse such an intrusive treatment outweighs the different and possibly more restricted state interests that might be recognized under the laws of another state.

B. Massachusetts Does Not Have a Compelling Interest Which May, Under Its Own Law, Be Asserted in Favor of Forcible Treatment with Antipsychotic Drugs, Absent an Emergency

Massachusetts' important interest in protecting third parties from violent patients has never been disputed in this action. However, as the courts below concluded, this state interest can justify forcible treatment only in emergency situations where a threat to others is present. *Rogers v. Okin*, 478 F. Supp. at 1364-65, 634 F.2d at 656. Although other institutional interests favoring forcible treatment undoubtedly exist, strong reasons support the conclusion of the courts below that these institutional interests are not of sufficient weight to override the right of the competent patient to refuse treatment with antipsychotic drugs. One institutional interest—of questionable weight—is the greater ease of administration because the patients are rendered more docile and manageable by the drugs. Pet. Br. at 64 & n.21. But the District Court

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[8] The converse is not true. State laws establishing that a certain state interest *does exist* do not determine the weight of that state interest when balanced against a contrary liberty interest protected by the federal constitution.

found that the doctors' predictions of widespread refusals, greatly increasing the institutional burdens, had not been realized during the time in which a temporary restraining order has been in effect. *Rogers v. Okin*, 478 F. Supp. at 1370. Another such interest is to avoid the greater cost that the state must bear if treatment without antipsychotic drugs extends the time of commitment.[4] As the District Court noted, however, considerations of cost and administrative convenience have never been held sufficient, standing alone, to override fundamental constitutional rights. *Id.* at 1370-71, citing *Watson v. City of Memphis*, 373 U.S. 526 (1963). *Cf. Doe v. Gallinot*, No. 80-5658, typescript at 8 (9th Cir. filed Sept. 9, 1981) (deciding rights of temporarily involuntarily committed patients to a due process hearing).

We submit that the only arguably *compelling* state interest in this case arises from the contention, argued forcefully by the American Psychiatric Association as *amici*, that as a matter of medically objective fact, treatment with antipsychotic drugs is conclusively in "the best interests" of any patient for whom it is prescribed.

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[4]Notwithstanding the assertions of petitioners and the American Psychiatric Association that recognition of the right to refuse antipsychotic drugs would lead to longer commitment durations, (Petitioners' Brief at 62, Brief of American Psychiatric Association at 15) the recent experience of shortened psychotic hospitalization may be explained by a number of factors, including "a complex interplay among new forms of medical treatment of psychiatric patients, administrative decisions, social and philosophic changes in medicine, and cultural and historical factors that are poorly understood." APA Task Force Report: Tardive Dyskinesia at 18 (1980).

The briefs of respondents and other *amici* favoring affirmance fully address the balance of interests between the fundamental right of a patient to reject this potentially disabling treatment, on one side, and, on the other, the state's interests in imposing it. We mean to emphasize a more limited point: that by reason of Massachusetts law, "the best interests" of the patient *cannot* be considered as a state interest or given any weight on the side of the balance favoring forcible treatment.

In *Guardianship of Roe,* the Supreme Judicial Court of Massachusetts specifically considered the interests involved in the decision whether to treat a noninstitutionalized, incompetent person with antipsychotic drugs. Starting with the premise that "[a]bsent an overwhelming state interest, a competent individual has the right to refuse such treatment," 421 N.E. 2d at 51, the Court concluded that an *incompetent* person, for whom a permanent guardian had been properly appointed, is nevertheless entitled to a judicial determination as to whether he should be subjected to treatment with antipsychotic drugs. In making that determination, the question the state probate court must decide "is *not* what is medically in the ward's best interests" but rather "what the incompetent individual would do if competent . . . ." *Id.* at 52 (emphasis in original). While the court may consider the best interests of the ward "as likely foundations of individual preference to be considered in the substituted judgment determination," the court's charge is to determine and honor the individual's own choice:

> If the judge feels that the "best interests" of the ward demand one outcome but concludes the ward's substituted judgment would require another, then, in the

> absence of an overriding State interest, the substituted judgment prevails.

Id., at 59-60 n.20.

In short, if the probate court concludes, having taken all relevant factors into account, that the incompetent would refuse antipsychotic drugs, the state may not rely on the benefits of such treatment to the patient as a legitimate reason to force treatment upon him. It follows, *a fortiori*, that when a *competent* person refuses antipsychotic drugs, the state may not override that choice by relying on the asserted medical benefits to him of taking the drugs.

Thus, although the Court expressly declined to rule on the rights of involuntarily committed patients, noting the *institutional* interests such as order and safety that might override a committed patient's refusal to consent, *id.* at 61 n.23[a], the Court's rationale establishes that

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[a]With reference to the possibility that, in particular circumstances, institutional interests may override the patient's refusal, the Supreme Judicial Court, 421 N.E. 2d at 61 n.23, cited *Commissioner of Correction v. Myers*, ... Mass. ...., 399 N.E.2d 452 (1979). In that case, a prisoner had threatened to refuse hemodialysis and medication—without which he would have died—if he were not transferred from a medium security prison. Under those circumstances, with the additional factors of a possible violent reaction to his death by other prisoners and possible similar threats from other prisoners, the Supreme Judicial Court affirmed an order that the prisoner be forced, if necessary, to undergo hemodialysis.

The risks that may be imposed on others within a mental hospital by a patient's refusing antipsychotic drug treatment are not as dramatic as in *Myers*, and are adequately accommodated by the Court of Appeals' instructions in remanding the case to the District Court to impose a more flexible standard allowing forcible treatment in an emergency. *Rogers v. Okin*, 634 at 656-57.

Massachusetts law does not recognize the therapeutic benefits to the patient as among the legitimate state interests that might justify forcibly administering antipsychotic drugs to a competent patient or an incompetent who would, if competent, refuse. In essence, Massachusetts forswears as a matter of state law any *parens patriae* interest in forcing a competent, refusing patient, or an incompetent patient who would refuse, to accept treatment medically determined to be in his best interests.[6]

Petitioners may not rely in this Court on a justification for treatment that would not be regarded as a legitimate state interest by the courts of Massachusetts. This Court customarily looks to state law to identify the nature and scope of the state interests that might be balanced against an individual's liberty interest. *E.g., Roe v. Wade,* 410 U.S. 113, 148 & n.42, 151 & nn.48-50 (1973); *Ingraham v. Wright,* 430 U.S. 651, 661-63 (1977). Just as state law consistent with an asserted interest may tend to substantiate it, state laws or decisions of state courts inconsistent with the supposed interest undercut the state's reliance on that purported interest.[7] In *Carey v. Population Services Inter-*

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[6] *Guardianship of Roe* confirms as a matter of state law the Court of Appeals' conclusion that the state's *parens patriae* interest does not justify treating competent patients who refuse. *Rogers v. Okin,* 634 F.2d at 657. Moreover, *Guardianship of Roe* further refines the scope of the *parens patriae* interest, making it clear that this interest does not justify forcibly treating incompetent patients who would refuse if they were competent.

[7] Again, this is not to say that state law can *expand* the scope of state interests beyond federal constitutional limits. We contend only that state law can *eliminate* from consideration a purported state interest that federal law might otherwise regard as a factor supporting the validity of the challenged provision. *See* note 3, *supra.*

national, 431 U.S. 678 (1977), which invalidated New York's law banning sales of contraceptives to minors, one of the state interests offered in support of the statute was deterrence of illegal sexual conduct among minors. Four Justices disregarded this asserted state interest, noting that another provision of New York law *required* that contraceptives be provided to "sexually active" children receiving welfare. *Id.* at 695 n.18 (opinion of Brennan, J.).[8]

In this case, the Court has a much stronger basis for disregarding the asserted state interest than an *inference* arising from other state laws in conflict with the purported interest. The highest court of Massachusetts has declared that the patient's "best interests" do not constitute a state interest in favor of forcible administration of antipsychotic drugs, when the patient is competent and refuses such treatment or is incompetent and would refuse if he were competent. *Guardianship of Roe*, 421 N.E.2d at 59-60 n.20.

Thus, on the basis of this limitation of state interests as a matter of state law, the policy of forcible treatment with

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[8] In *Stanton v. Stanton*, 421 U.S. 7 (1975), this Court invalidated the portion of a Utah statute that established different ages of majority for males and females. Acknowledging the state's reliance on the fact "that females tend to marry earlier than males," the Court attributed no weight to that factor as a justification for the challenged provision because another portion of the same statute provided that "all minors obtain their majority by marriage." *Id.* at 14. The Court in *Stanton v. Stanton*, like the four Justices in *Carey v. Population Services Int'l.*, 431 U.S. at 695 n.18 drew an inference, *based on state law* other than the challenged provision, that the asserted state interest should be disregarded.

antipsychotic drugs cannot be justified by the medical need of involuntarily committed patients for such treatment,[9] the therapeutic effects of the drugs on many willing patients,[10] the state's obligation to the patient to provide effective treatment,[11] or the dictates of medical standards regarding advisable modes of treatment.[12]

III

INVOLUNTARY COMMITMENT UNDER MASSACHUSETTS LAW DOES NOT PROVIDE A CONSTITUTIONALLY ADEQUATE BASIS FOR DEPRIVING PATIENTS OF THEIR RIGHT TO REFUSE FORCIBLE TREATMENT WIH ANTIPSYCHOTIC DRUGS

Whether rooted in state or federal law, a patient's liberty interest in refusing forcible treatment with anti-

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[9]Pet. Br. at 54-55 (asserting that patients' "need" justifies forcible treatment).

[10]Pet. Br. at 59-60 and American Psychiatric Association Brief at 14-17 (relying on the therapeutic benefits of drugs).

[11]The American Psychiatric Association notes, at page 11 of its brief, that Massachusetts is obligated under its own law to provide treatment to involuntary mental patients. Nothing in state law mandates any particular mode of treatment. The argument in favor of affirmance does not depend, as the American Psychiatric Association assumes, *e.g.* at page 13 of its brief, on the existence of a right to refuse any and all forms of treatment. The right to refuse antipsychotic drugs arises because of their particularly serious, adverse and intrusive effects.

[12]Petitioners rely on the state's interest in "maintaining acceptable medical standards" at pages 64-66 of their brief. Insofar as "acceptable medical standards" refers to the medical professionals' opinions as to whether the "benefit/risk ratio" of treatment with antipsychotic drugs is favorable, American Psychiatric Association brief at 15-16 n.13, *Guardianship of Roe* holds that it is the *patient's* assessment of the benefits and risks that must be honored. 421 N.E.2d at 51-52.

psychotic drugs is protected by federal constitutional standards of procedural due process. *Vitek v. Jones*, 445 U.S. at 490-491 & n.6. The determination of what process is due necessarily turns on the facts and circumstances of the particular case, and is fully addressed in the context of the record below by the respondents. Our point, again, is more limited: that involuntary commitment under Massachusetts law does not in itself provide procedural protections that are a constitutionally adequate basis for depriving patients of their right to refuse this potentially devastating and disabling form of treatment.

Petitioners and *amici* urging reversal argue that Massachusetts involuntary commitment procedures do afford any constitutionally required protections regarding the forcible administration of antipsychotic drugs to involuntarily committed patients. Pet. Br. at 26-28; American Psychiatric Association Brief at 13-14. They attach controlling significance to the fact that all involuntarily committed patients are determined, after full due process, to be "mentally ill." Pet. Br. at 26-28, 33-34; American Psychiatric Association Brief at 8-9. To the extent this argument depends on the implicit assumption that all "mentally ill" patients are incompetent to make treatment decisions it is flatly inconsistent with the unchallenged conclusion of the Court of Appeals regarding Massachusetts law. *Rogers v. Okin*, 634 F.2d at 658-59. To the extent it does not presume incompetence, it simply begs the constitutional questions in the case. For despite efforts to cloud the issue in medical mystique, the constitutional analysis is straightforward. Involuntary commitment can operate to extinguish a competent patient's constitutional rights in only

two ways: either the fact of commitment gives the state a compelling interest in forcible drug treatment that in all cases outweighs the constitutional right to refuse; or the *process* of involuntary commitment affords constitutionally adequate procedures in the case of each patient for depriving him, upon commitment, of his constitutional right to refuse treatment with antipsychotic drugs.

The first question is one of substantive constitutional rights. To say that commitment entails a determination of "mental illness" adds nothing to the analysis unless that finding gives rise to a compelling state interest that justifies forcible treatment with antipsychotic drugs. But, as the preceding section demonstrates, Massachusetts denies as a matter of its own law any state interest, based on the patient's best medical interests, in imposing a medical treatment as intrusive as antipsychotic drugs on a patient who chooses to reject it. *Guardianship of Roe*, 421 N.E. 2d at 59-60 and n. 20. *See* discussion at pp. 15-21, *supra*.

The second question is one of procedural due process. Petitioners and the *amici* favoring reversal argue that the involuntary commitment process alone adequately protects the liberty interests implicated by forcible treatment with antipsychotic drugs, and that such "medically appropriate" treatment is among the "conditions of confinement" validly imposed on the patient as a result of the determinations made at the commitment stage. American Psychiatric Association Brief at 13-14. *See Vitek v. Jones*, 445 U.S. at 493. Again, the key factual determination relied upon to support this reasoning is the finding at the commitment stage that the patient is "mentally ill" and therefore in

need of treatment. Pet. Br. at 26-35; American Psychiatric Association Brief at 8-9. Once this is established, it is argued, the patient has lost the right to refuse any medically "appropriate" treatment. But again, the argument does nothing more than circle the central constitutional question: what is it about a finding of "mental illness" that gives the state power to impose on competent patients a form of treatment that has indisputably profound and potentially devastating side effects?

The liberty interest at stake here does not turn on whether the treatment is medically appropriate. It is, rather, the right to reject a medically recommended treatment that has well-documented, serious and unavoidable consequences. As the Supreme Judicial Court of Massachusetts recognized, the issue is not one of medicine but of self-determination.[13] *See Guardianship of Roe*, 421 N.E. 2d at 59-61. The attempt to sweep this uniquely individual right aside under the general rubric of "appropriate medical treatment" only serves to underscore that the liberty interest is in fact entirely unprotected by the procedures for involuntary commitment.

The Court of Appeals correctly held that nothing short of an emergency situation—nothing, certainly, that *could*

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[13]For the same reason, the common law cause of action for medical malpractice and the ethical tenets of the medical profession, which address the possibility that doctors may *inappropriately* prescribe antipsychotic medications, do not provide alternate or supplemental procedural protection for this substantive right. In this and other respects, the liberty interest at stake here differs crucially from the right involved in *Ingraham v. Wright*, 430 U.S. at 670, upon which the American College of Neuropsychopharmacology relies in its *amicus curiae* brief at 24-25.

be decided once and for all at the commitment stage—would involve a sufficiently compelling state interest to justify forcible antipsychotic drug treatment of a competent patient, or of an incompetent patient absent a substituted judgment that he would consent. 634 F.2d at 661. However, even if one accepts the contrary premise that some determination could be made at that stage, nothing in the Massachusetts statutes governing involuntary commitment request the court even to *consider*, much less *determine*, in commitment proceedings, whether sufficient reason exists to justify seriously intrusive treatment modes for the particular patient involved. MASS. GEN. LAWS ANNOT. ch. 123 §§ 2, 6-8 (1981).

Finally, the decision of the Massachusetts Supreme Judicial Court in *Guardianship of Roe* established a state-created liberty interest, discussed at pp. 5-8, *supra*, requiring constitutionally adequate procedures to determine whether the patient is competent; if incompetent, whether the patient would refuse antipsychotic drugs; and whether institutional interests outweigh the right to refuse in particular circumstances. *See* discussion at p. 8, *supra*. Present Massachusetts commitment procedures address none of these issues.

In short, commitment procedures under Massachusetts law cannot be relied upon to provide the procedural protections required by the Due Process Clause of the Fourteenth Amendment before a patient can be deprived of his constitutional right to refuse treatment with antipsychotic drugs.

CONCLUSION

For the reasons stated in this brief and in the brief of Respondents, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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